STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE COURT OF APPEALS)

BRUCE MILLAR, an individual,

Plaintiff-Appellant,

V

CONSTRUCTION CODE AUTHORITY,
CITY OF IMLAY CITY, and ELBA TOWNSHIP,

Defendants-Appellees. /

Supreme Court No. 154437

Court of Appeals No. 326544

Lower Court No. 14-047734-CH

SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLEE CITY OF IMLAY CITY

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STATEMENT OF THE QUESTION PRESENTED FOR SUPPLEMENTAL BRIEFING

Whether Millar's claim against Imlay City under the Whistleblowers' Protection Act is barred by the 90-day limitation period set forth in MCL 15.363(1)?

Plaintiff-Appellant answers, "No."

Defendant-Appellee City of Imlay City answers, "Yes."

Defendant-Appellee Elba Township answers, "Yes."

Defendant-Appellee Construction Code Authority answers, "Yes."

The Lapeer County Circuit Court answered, "Yes."

The Michigan Court of Appeals answered, "Yes."

INTRODUCTION

Plaintiff-Appellant Bruce Millar ("Millar") brought this lawsuit alleging, among other things, that Defendant-Appellee City of Imlay City ("Imlay City"), along with co-defendants Construction Code Authority and Elba Township, violated the Michigan Whistleblowers' Protection Act, MCL 15.361, *et seq*. **Exhibit A**, Complaint, 6/26/14.[1] Upon Defendants' respective motions to dismiss and for summary disposition, the Lapeer County Circuit Court dismissed Millar's complaint with prejudice, finding, among other things, that Millar's Whistleblowers' Protection Act claim was untimely because he did not initiate the action within 90 days of a March 27, 2014 letter from the Construction Code Authority notifying Millar that neither Elba Township nor Imlay City wished to have Millar serve as an inspector within their respective jurisdictions. The circuit court rejected Millar's contention that the claim accrued on March 31, 2014 when he alleges that he received the letter. **Exhibit B**, Tr 3/2/15, pp 11-12.

The Court of Appeals affirmed the trial court's order. The Court determined that a claim under the Whistleblowers' Protection Act accrues at "the time the wrong upon which the claim is based was done regardless of the time when damage results." Slip op, p 6, citing *Joliet v Pitoniak*, 475 Mich 30, 36; 715 NW2d 60 (2006). Thus, under the circumstances of this case, the alleged wrong, i.e., the violation of the Whistleblowers' Protection Act, occurred when the City wrote a letter to the Construction Code Authority on March 20, 2014, directing it to terminate Millar's services. *Id*. Therefore, Millar was required to commence his Whistleblowers' Protection Act claim against the City within 90 days of that

[1] Unless otherwise noted, exhibit references refer to the exhibits attached to Imlay City's brief in the Court of Appeals.

date, but failed to do so. *Id*. Even using the date that the Construction Code Authority sent a letter to Millar – March 27, 2014 – the claim was still untimely. *Id*.

Millar now seeks leave of this Court and this Court has requested supplemental briefing from the parties. Millar's position is that the Court should not require an employee "to constantly ask whether any adverse employment action is in the works," and "should not direct that the clock begins to run on a [Whistleblowers' Protection Act] claim when an employer makes a decision to take action" but does not convey this decision to the employee. Application for Leave, p 21. Millar thus seeks a court-created rule requiring notice, which is in essence a discovery rule. However categorized, such a rule is not provided for in the plain language of the statute. Here, MCL 15.363(1) provides a 90-day limitations period for a Whistleblowers' Protection Act claim, stating in relevant part: "A person who alleges a violation of this act by bringing a civil action for appropriate injunctive relief, or actual damages, or both *must do so within 90 days after the occurrence of the alleged violation of this Act*." (Emphasis added). The statute does not address notice nor indicate that the limitations period begins to run only upon a plaintiff's discovery of the claim against him. This Court has repeatedly held that any sort of extra-statutory construction to alleviate a seemingly "harsh" result is impermissible. See e.g., *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378; 738 NW2d 664 (2007); *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005). Accordingly, Millar's claim against the City is untimely and leave must be denied.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Material facts

According to Millar's complaint, Millar was employed as an at-will plumbing, mechanical and/or fire inspector by Construction Code Authority during all times relevant to this action. **Exhibit A**, Complaint, ¶¶ 1, 9. Imlay City contracted with the Construction Code Authority for these services by an Interlocal Agreement as permitted by the Urban Cooperation Act of 1967, MCL 124.501, *et seq*. Accordingly, in the course of his employment, Millar claims to have conducted "numerous commercial and residential inspections in Imlay City and Elba Township." **Exhibit A**, Complaint, ¶ 12.

On March 20, 2014, Imlay City Manager Dennis Collison wrote and sent a letter to Construction Code Authority Chairman Scott Jarvis indicating that the City did not wish to have Millar perform inspections in the community, effective immediately. In pertinent part, that letter provided: "The City of Imlay City is requesting that plumbing and mechanical inspector, Bruce Millar, not do inspections in the community effective immediately." **Exhibit C**, 3/20/14 Correspondence from Imlay City to Jarvis. Elba Township had sent a very similar letter only nine days earlier, on March 11, 2014, requesting that "Bruce Millar no longer perform inspections within Elba Township." **Exhibit D**, 3/11/14 Correspondence from Elba Township to Hayes.

Millar was informed of Imlay City and Elba Township's directives on March 27, 2014, when Jarvis authored and provided written correspondence to Millar, the pertinent part of which provided:

> Please be advised that I have recently been notified by both Elba Township and Imlay City. I regret to inform you that they no longer wish for you to act as their plumbing and mechanical official and request that you immediately

> cease conducting all mechanical and plumbing inspections within their communities.

Exhibit E, 3/27/14 Correspondence from Jarvis to Millar; **Exhibit A**, Complaint, ¶ 18. That correspondence reiterated Millar's continued employment with Construction Code Authority: "You, as well as your knowledge and expertise are extremely valuable to our organization. I am confident we can all proceed and continue to work together in a professional manner as your employment continues with this company and for the remaining municipalities it represents." *Id*.

B. Material proceedings

1. Millar files his complaint

On June 26, 2014 – 98 days after Imlay City's letter to Construction Code Authority and 91 days after Construction Code Authority's letter to Millar – Millar filed this action in Lapeer County Circuit Court, naming Construction Code Authority, City of Imlay City, and Elba Township as defendants. **Exhibit A,** Complaint. Millar claimed that the defendants violated the Whistleblowers' Protection Act (Count I), wrongfully terminated him in violation of public policy (Count II), and engaged in civil conspiracy "to commit the wrongdoings set forth in Counts I and II." (Count III). *Id*., ¶ 7. Imlay City's answer denied liability and asserted the following defenses: (1) that portions of Plaintiff's claims were time-barred; (2) that the Whistleblowers' Protection Act provided the exclusive remedy available to Millar, requiring dismissal of all other counts; (3) that Imlay City was entitled to governmental immunity; and (4) that Millar failed to state a claim for conspiracy, or for any other claim upon which relief could be granted. Imlay City's Answer to Plaintiff's Complaint, Affirmative Defenses, Reliance Upon Jury Demand, 8/19/14.

2. Imlay City moves to dismiss

Consistent with those defenses, Imlay City moved to dismiss Millar's complaint in its entirety pursuant to MCR 2.116(C)(7) and 2.116(C)(8). Defendant City of Imlay City's Motion to Dismiss, 1/2/15. Imlay City argued that Millar's suit was commenced outside the 90-day statute of limitations for Whistleblowers' Protection Act claims, which began running on March 20, 2014, when the alleged wrongful action, i.e., the City's letter requesting that Millar no longer perform work within its jurisdiction, was sent. *Id*., p 8. With respect to the wrongful termination and conspiracy claims, Imlay City argued that it was entitled to governmental immunity as it was engaged in the discharge or exercise of a governmental function when making requests to the Construction Code Authority concerning the delivery of code inspections and enforcement with the City. *Id*., pp 7-8. Co-Defendants Elba Township and Construction Code Authority also moved for summary disposition on virtually identical grounds.

Millar opposed the motions, claiming that his Whistleblowers' Protection Act claim was timely filed because he "was entirely unaware until March 31, 2014" of the letters from Imlay City and Elba Township, and that therefore the start date for purposes of calculating the 90-day period should begin on that date. Millar's Response in Opposition to Imlay City's Motion to Dismiss and Elba Township's Motion for Summary Disposition, 2/13/15, p 7. Next, Millar summarily asserted in a single paragraph that his "Whistleblowers' Protection Act claims are not exclusive," suggesting that "discovery may flesh out for the plaintiff exactly what did go on prior to restricting his work opportunities and responsibilities[.]" *Id*., p 8. Finally, Millar claimed that neither Imlay City nor Elba Township was protected by governmental immunity "for colluding and conspiring to bar a building inspector from its

jurisdiction because it disagrees with and takes exception to the inspector's good faith code enforcement efforts." *Id*., pp 8-9. Millar requested the circuit court permit further discovery. *Id*., p 9.

Imlay City filed a brief reply, refuting Millar's request for further discovery to support his wrongful "termination" and conspiracy claims as irrelevant because those claims are statutorily barred as a matter of law. Defendant Imlay City's Reply to Plaintiff's Response to its Motion to Dismiss, 2/25/15. With respect to Millar's Whistleblowers' Protection Act claim, Imlay City stressed that the plain language of the statute requires the suit to be brought within 90 days "of the alleged violation," which allegedly occurred when Imlay City notified Construction Code Authority in writing that it no longer wanted Millar to perform inspection work in its jurisdiction, on March 20, 2014. *Id*., p 2. Imlay City pointed out that both case law from the Michigan Supreme Court and the federal district of Michigan have interpreted the statute in this way. *Id*. With respect to Millar's public policy wrongful "termination" claim, Imlay City pointed out that reporting violations of building codes, regulations, rules, and statutes "is clearly within the auspices of the Whistleblowers' Protection Act, and the Whistleblowers' Protection Act is therefore Plaintiff's exclusive remedy." *Id*., p 3. Finally, Imlay City confirmed that there is no "intentional tort" or "conspiracy" exception to governmental immunity, which applied to bar Millar's conspiracy claim. *Id*., pp 3-4.

3. The trial court rules in Imlay City's favor and the Court of Appeals affirms

The Honorable Nick O. Holowka entertained oral argument on Imlay City's dispositive motion on March 2, 2015. The court simultaneously considered the Construction Code Authority and Elba Township's motions for summary disposition. After

considering the arguments of counsel, the circuit court determined that Millar's Whistleblowers' Protection Act claim was time-barred, reasoning as follows:

> Here, viewing the evidence in the light most favorable to the plaintiff, the last alleged violation of the Whistleblowers' Protection Act, if any, occurred when the Construction Code Authority notified the Plaintiff in writing on March 27, 2014, that neither Elba Township nor Imlay City wished to have the Plaintiff serve as an inspector within their respective jurisdictions.
>
> Plaintiff does not allege any further violations of the Whistleblowers' Protection Act by the Defendants after that date. Consequently, the 90-day limitation period began to run March 27, 2014. This means Plaintiff had until June 25, 2014 to file his lawsuit. However, as previously stated, the Plaintiff did not initiate the present action until June 26, 2014. Plaintiff's Whistleblowers' Protection Act claim, therefore, is untimely and dismissal is warranted.

Tr 3/2/15, pp 11-12.

The circuit court also dismissed Millar's wrongful termination claim on the basis that it was barred by the exclusive remedy provision of the Whistleblowers' Protection Act, because "a review of the Plaintiff's complaint reveals that the Plaintiff's wrongful termination claim flows from the same circumstances surrounding his Whistleblowers' Protection Act claim." *Id.*, p 14. Finally, the circuit court concluded that Millar's civil conspiracy claim failed where Millar could not demonstrate "some underlying tortious conduct" as required for a civil conspiracy claim, given the dismissal of the Whistleblowers' Protection Act and wrongful termination claims. *Id.*, pp 14-15.

A corresponding order was entered on March 19, 2015. **Exhibit F**. Millar timely appealed that decision and the Court of Appeals affirmed. As is relevant to this supplemental briefing, the Court held that a claim brought under the Whistleblowers' Protection Act accrues at "the time the wrong upon which the claim is based was done

regardless of the time when damage results." Slip op., p 6, citing *Joliet*, 475 Mich at 36. Thus, under the facts of this case,

> [T]he alleged wrong occurred when the City and Township wrote the letters to the CCA directing the CCA to terminate plaintiff allegedly in retaliation for his protected activity. In other words, while damages resulted when plaintiff received the letter, the wrong upon which plaintiff's claim is based occurred when the City and Township terminated plaintiff in retaliation for his protected activity—i.e. March 11, 2014 and March 20, 2014. Therefore, plaintiff was required to commence his WPA action within 90 days of those dates. Plaintiff failed to do so.

Slip op, p 6. Even using the date that the Construction Code Authority sent a letter to Millar – March 27, 2014 – the claim was still untimely. *Id*.

The Court of Appeals also addressed the wrongful termination in violation of public policy claim and found that "the crux of both claims [Whistleblowers' Protection Act and wrongful termination] arise from the same alleged wrongful conduct—i.e. retaliatory termination for reporting various code violations," and therefore, the Whistleblowers' Protection Act provided a statutory remedy for the alleged retaliation – a remedy that was "exclusive and not cumulative." Slip op, p 7 (internal citation and punctuation omitted). Accordingly, the trial court did not err in dismissing the wrongful termination claim. *Id*., p 8.

It followed that, because Millar's Whistleblowers' Protection Act claim was time-barred and the wrongful termination claim failed as a matter of law, "necessarily, his conspiracy claim also fails as a matter of law." Slip op, p 8. Given its resolution of these issues, the Court did not consider whether the City was entitled to governmental immunity for the wrongful termination and conspiracy claims. *Id*., n 1.

Millar then sought leave to appeal with this Court, and the City filed an answer in opposition. This Court has now requested supplemental briefing to address whether

Millar's "claim under the Whistleblowers' Protection Act was barred by the 90-day limitation period set forth in MCL 15.363(1)."

ARGUMENT

Millar's Claim Against Imlay City Under The Whistleblowers' Protection Act Is Barred By The 90-Day Limitation Period Set Forth In MCL 15.363(1)

A. Millar's claim is barred by the Whistleblowers' Protection Act's 90-day statute of limitations because he filed his claim more than 90 days after Imlay City committed the alleged violation of the act

The Whistleblowers' Protection Act "provides a remedy for an employee who suffers retaliation for reporting or planning to report a suspected violation of a law, regulation, or rule to a public body." *Anzaldua v Neogen Corp*, 292 Mich App 626, 630; 808 NW2d 804 (2011). Under MCL 15.362:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

MCL 15.363(1) sets forth a 90-day limitations period for a Whistleblowers' Protection Act claim, stating in relevant part: "A person who alleges a violation of this act by bringing a civil action for appropriate injunctive relief, or actual damages, or both must do so within 90 days after *the occurrence of the alleged violation of this Act*." (Emphasis added).

The plain language of this statute does not address accrual and thus does not include a notice requirement or any type of discovery rule. Instead, it marks accrual from the date of the alleged violation of the act. In *Joliet v Pitoniak,* 475 Mich 30, 40; 715 NW2d 60 (2006), this Court, citing with approval the dissenting opinion in *Jacobson v Parda Fed Credit Union*, 457 Mich 318; 577 NW2d 881 (1998) (which was overruled in *Joliet*),

observed that a claim under the Whistleblowers' Protection Act accrues "on the occurrence of the alleged violation of this act." Further, in *Joliet*, this Court explained that "a 'violation' of the WPA under the plain language of MCL 15.362" consists of "discharge, threats, or other discrimination by the employer," and therefore, again, "it is the employer's wrongful act that starts the period of limitations . . . ." *Id*. at 41.

As one panel of the Court of Appeals relying on *Joliet* has recognized, basing the accrual of a claim under the Whistleblowers' Protection Act on the date the discriminatory act occurs "is consistent with the general rule regarding statutes of limitations that a 'claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.'" *Bradford v MGH Family Health Ctr*, No. 325312, 2016 WL 156185, at *2 (Mich Ct App January 12, 2016) (unpublished) (attached hereto as **Exhibit 1**), quoting MCL 600.5827.[2] Indeed, as the dissent in *Jacobsen* observed, "the United States Supreme Court has consistently held that the relevant inquiry is 'the time of the discriminatory acts,' rather than ... 'the time at which the consequences of the acts became most painful.'" *Jacobson*, 457 Mich at 334 (Taylor, CJ, dissenting), quoting *Delaware State College v Ricks*, 449 US 250, 258; 101 S Ct 498; 66 L Ed 2d 431 1980.

Accordingly, although *Joliet* itself addressed a claim under the Civil Rights Act, its analysis of the general accrual statute, MCL 600.5827 is instructive here. MCL 600.5827 provides:

> Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838,1 and in cases not covered by these sections the claim accrues

[2] As required by MCR 7.215(C), the City notes that it is citing this unpublished case because it provides insight into how the Court of Appeals has been determining the accrual date of a claim under the Whistleblowers' Protection Act.

> at the time the wrong upon which the claim is based was done regardless of the time when damage results.

The issue considered in *Joliet* was whether the Plaintiff's claim under the Civil Rights Act accrued on the date of the alleged discriminatory act which led to the plaintiff's resignation or on the plaintiff's last day of work. As this Court explained, "the basic question to answer when analyzing the accrual date of a claim under the CRA is when did the 'injury' or 'wrong' take place." *Joliet*, 475 Mich at 40.

The statute of limitations for the claim in *Joliet* was "3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property." MCL 600.5805(9). This Court explained that "accrual under the three-year statute of limitations is measured by 'the time the wrong upon which the claim is based was done regardless of the time when damage results.'" *Joliet,* 475 Mich at 36, quoting MCL 600.5827. Under those circumstances, "a claim of discrimination accrues when the adverse discriminatory acts occur." *Id.* at 31. In other word, "the plaintiff's claims accrued at the time the wrongs on which her claims are based were committed [i.e., when the discriminatory acts occurred], not when she suffered damage [when she resigned based on the discriminatory acts]. Thus, the relevant date for the period of limitations is not plaintiff's last day of work, but the date of the last discriminatory incident or misrepresentation." *Id*., at 40–41. But had there been an actual discharge based on discrimination and not a constructive discharge based on discriminatory acts, the claim would have accrued on the last day of work because the termination equated to the wrongful act. *Id*. at 32.

In this case, the City's alleged violation of the Whistleblowers' Protection Act – which equates to the time when the wrong was done – occurred on March 20, 2014, when

it directed the Construction Code Authority, via written correspondence, that Millar cease performing inspections in the City, effective immediately. **Exhibit C**, 3/20/14 Correspondence from Imlay City to Jarvis. Millar did not file his Whistleblowers' Protection Act claim within 90 days from that date, or by June 18, 2014, rather, he filed it 98 days later on June 26, 2104. Even assuming the claim accrued on March 27, 2014, which is the date when Millar was informed of Imlay City's (and Elba Township's) directives in a letter from the Construction Code Authority (see **Exhibit E**, 3/27/14 Correspondence from Jarvis to Millar; Exhibit A, Complaint, ¶ 18),[3] Millar's claim was untimely, having been filed 91 days later on June 26, 2014.

B. This Court will not incorporate a discovery rule or other requirement into a statute of limitations that does not expressly provide for one

The issue in this appeal is whether Millar's claim against Imlay City in fact accrued at a later date than March 20, 2014. Millar contends that various cases stand for the proposition that an employee's knowledge of the employer's violative conduct – that is, when the action is made and communicated to the employee – determines the accrual date. (See Application for Leave, pp 15-16). Millar thus argues that his claim under the Whistleblower's Protection Act did not accrue until March 31, 2014 because that is when he was handed a copy of the Construction Code Authority's March 27th letter. In essence, Millar is advocating for a notice requirement or discovery rule. But this Court has repeatedly refused to engraft a discovery rule onto a statute of limitations where one is not otherwise expressly provided for.

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[3] Millar attempts to create a question of fact regarding when and how the Construction Code Authority delivered the letter to him and when he received it. Millar's Application for Leave to Appeal, pp 4-5, 12, 15. But such issues are not relevant to determining when Imlay City's alleged violation of the Whistleblowers' Protection Act occurred.

The Revised Judicature Act addresses statues of limitations in Chapter 58. Under MCL 600.5827:

> Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

In *Boyle v Gen Motors Corp*, 468 Mich 226, 231; 661 NW2d 557 (2003), the Court observed that "[u]nder M.C.L. § 600.5827 a claim accrues when the wrong is done, unless §§ 5829 to 5838 apply."[4] Further, "[t]he wrong is done when the plaintiff is harmed rather than when the defendant acted." *Id*. at n. 5, citing *Stephens v Dixon*, 449 Mich 531, 534-535; 536 NW2d 755 (1995).

For example, in *Boyle*, this Court held that the plaintiffs' cause of action for fraud arising out of the sale of a car dealership accrued, and thus the six-year statute of limitations under MCL 600.5813 began to run, when the alleged wrong was done, i.e., when the sale occurred, not seven years later when the plaintiff buyers discovered the alleged fraud. MCL 600.5813 provides that "All other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes." As this Court explained, the discovery rule in fraud cases had been rejected in *Ramsey v Child, Hulswit & Co,* 198 Mich 658; 165 NW 936 (1917), which took into account the then-controlling statutes and observed that

[4] As this Court explained, "[t]hose sections govern the accrual of claims regarding entry on or recovery of land, mutual and open account current, breach of warranty or fitness, common carriers to recover charges or overcharges, life-insurance contracts where the claim is based on the seven-year presumption of death, installment contracts, alimony payments, and malpractice." *Boyle*, 468 Mich at 231.

> the Legislature effected a compromise between the rule at law, under which the period of limitations begins to run from the time the fraud is perpetrated, and the rule at equity, under which the period begins to run when the fraud is discovered. In addition to the six-year period of limitations applicable to frauds, the Legislature provided that if the cause of action was fraudulently concealed, it could be brought two years after it was discovered or should have been discovered.

Boyle, 468 Mich at 231. The Court further noted that in *Thatcher v Detroit Trust Co*, 288 Mich 410; 285 NW 2 (1939), it had likewise rejected the notion that a cause of action for fraud accrues when it is discovered or should have been discovered, basing that conclusion on *Ramsey* and the statutes then in effect. Finally, aside from the controlling authority in *Ramey* and *Thatcher*, the legislature had since passed MCL 600.5827. In short, although the discovery rule has been adopted in some specific cases such as medical malpractice actions, the Court had never held that the rule applied to fraud cases. *Id.* at 231.

Again in *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378; 738 NW2d 664 (2007), this Court refused to apply a discovery rule when it was not provided for in the plain language of the applicable statute of limitations. *Trentadue* was a wrongful death case. The plaintiff's decedent leased a gate house on the grounds' of one of the defendant's estate. The decedent was found raped and murdered on November 9, 1986. The crime remained unsolved until 2002 when DNA evidence identified an employee of the defendant sprinkler service company as the perpetrator. The plaintiff brought suit on August 2, 2002 against several defendants associated with the sprinkler company and the estate.

The defendants argued that the claim was time barred and this Court agreed, rejecting the Court of Appeals' contrary conclusion that "the common-law discovery rule tolled the period of limitations" because the plaintiff was unaware of a cause of action against the defendants "until their relationship with the killer became known." *Trentadue,*

479 Mich at 385. The statute of limitations at issue in *Trentadue*, MCL 600.5805(10), provides that: "The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property." Again, however, MCL 600.5827 governs accrual and, quoting *Boyle*, this Court reiterated that "[t]he wrong is done when the plaintiff is harmed . . . ." *Trentadue*, 479 Mich at 388. The Court of Appeals thus erred because it "failed to address the absence of the common-law discovery provision in MCL 600.5827." *Id.* at 386.

In reaching its conclusion, this Court referenced the structure of the Revised Judicature Act, which incorporates a discovery rule in specific situations: MCL 600.5838(2) (professional malpractice), 600.5838a(2) (medical malpractice), 600.5839(1) (actions brought against certain defendants alleging injuries from unsafe property), and 600.5855 (actions alleging that a person who may be liable for the claim fraudulently concealed the existence of the claim or the identity of any person who is liable for the claim, MCL 600.5855). The Court thus found it significant that none of these tolling provisions covered the situation presented, i.e., "tolling until the identity of the tortfeasor is discovered." *Trentadue*, 479 Mich at 388.

The Court further rejected the plaintiff's theory, similar to that espoused by Millar, that a court-created discovery rule was needed to alleviate the seemingly harsh result. Again, "the statutory scheme is exclusive and thus precludes this common-law practice of tolling accrual based on discovery in cases where none of the statutory tolling provisions apply." *Trentadue*, 479 Mich at 389. "[T]he relevant sections of the Revised Judicature Act comprehensively establish limitations periods, times of accrual, and tolling for civil cases."

The Court further cited MCL 600.5855 as "a good indication that the Legislature intended the scheme to be comprehensive and exclusive." *Trentadue*, 479 Mich at 391.

> MCL 600.5855 provides for essentially unlimited tolling based on discovery when a claim is fraudulently concealed. If we may simply apply an extrastatutory discovery rule in any case not addressed by the statutory scheme, we will render § 5855 effectively meaningless. For, under a general extrastatutory discovery rule, a plaintiff could toll the limitations period simply by claiming that he reasonably had no knowledge of the tort or the identity of the tortfeasor. He would never need to establish that the claim or tortfeasor had been fraudulently concealed.

Id.

In short, "[s]ince the Legislature has exercised its power to establish tolling based on discovery under particular circumstances, but has not provided for a general discovery rule that tolls or delays the time of accrual if a plaintiff fails to discover the elements of a cause of action during the limitations period, no such tolling is allowed. Therefore, we conclude that courts may not employ an extrastatutory discovery rule to toll accrual in avoidance of the plain language of MCL 600.5827." *Trentadue*, 479 Mich at 392.

The law in Michigan, as articulated in *Trentadue*, clearly contrasts to that of certain other states, which apply a discovery rule as a matter of course. For example, the Wisconsin Supreme Court has held that "[p]ast deference to the legislature does not preclude our adoption of the discovery rule." *Hansen v AH Robins, Inc*, 113 Wis 2d 550, 560; 335 NW2d 578 (1983). Thus, the court applies the discovery rule in "all tort actions other than those already governed by a legislatively created discovery rule. Such tort claims shall accrue on the date the injury is discovered or with reasonable diligence should be discovered, whichever occurs first." *Id*.

In Indiana, the state's code contains several specific statutes of limitations. It also provides for tolling in certain situations, such as when there is a legal disability (Ind Code

Ann 34-11-6-1) or concealment (Ind Code Ann 34-11-5-1). That state's code also addresses accrual specifically with respect to mutual, open, and current accounts. See Ind Code Ann 34-11-3-1. But the Indiana Supreme Court has held that "the cause of action of a tort claim accrues and the statute of limitations begins to run when the plaintiff knew or, in the exercise of ordinary diligence, could have discovered that an injury had been sustained as a result of the tortious act of another." *Wehling v Citizens Nat Bank*, 586 NE2d 840, 843 (Ind 1992). See also *Pflanz v Foster*, 888 NE2d 756, 759 (Ind 2008) ("Under Indiana's discovery rule, a cause of action accrues, and the statute of limitation begins to run, when a claimant knows or in exercise of ordinary diligence should have known of the injury.")

Similarly, under Pennsylvania law, there are several specific statutes of limitation, see 42 Pa. Stat. and Cons. Stat. Ann. 5521 *et seq*., and the general rule provides that "[t]he time within which a matter must be commenced under this chapter shall be computed, except as otherwise provided by subsection (b) or by any other provision of this chapter, from the time the cause of action accrued, the criminal offense was committed or the right of appeal arose." 42 Pa. Stat. and Cons. Stat. Ann. 5502(a). There is no statute addressing accrual of claims in general. That state's Supreme Court has held that while "[m]istake, misunderstanding, or lack of knowledge in themselves do not toll the running of the statute," the discovery rule acts to toll the running of a statute of limitations. *Fine v Checcio*, 582 Pa 253, 266; 870 A2d 850 (2005). "The discovery rule applies to toll the statute of limitations in <u>*any*</u> case where a party neither knows nor reasonably should have known of his injury and its cause at the time his right to institute suit arises." *Id*. at 269 (emphasis added).

Virginia, by contrast, has a statute akin to MCL 600.5827. Va Code Ann 8.01-230 provides that:

> In every action for which a limitation period is prescribed, the right of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person or damage to property, when the breach of contract occurs in actions ex contractu and not when the resulting damage is discovered, except where the relief sought is solely equitable or where otherwise provided under § 8.01-233, subsection C of § 8.01-245, §§ 8.01-249, 8.01-250 or other statute.

It is well established that "Virginia does not follow a 'discovery rule' in applying the statute of limitations." *Smith v Danek Med, Inc*, 47 F Supp 2d 698, 701 (WD Va 1998). Indeed, like this Court, Virginia courts are conscious of the fact that "[t]he Virginia General Assembly has consistently declined to adopt a 'discovery rule.'" *Van Dam v Gay*, 280 Va 457, 460; 699 SE2d 480 (2010). Thus, as the Virginia Supreme Court explained in *Thorsen v Richmond Socy for the Prevention of Cruelty to Animals*, 292 Va 257, 291; 786 SE2d 453 (2016), which addressed a contract claim, "the primary purpose of Code § 8.01–230 as to contracts is to avoid creating a so-called 'discovery rule,' . . . . *The requirement of the cause of action is merely that one sustains injury, not that it be known*." (Emphasis added). See also *Bullion v Gadaleto*, 872 F Supp 303, 306 (WD Va 1995) ("a claimant need not know of his injury in order for the cause of action to accrue.") For example, in *Bullion*, the federal district court, applying Virginia law, held that the plaintiff patient's claim against his psychologist for breach of the duty of confidentiality accrued when the psychologist revealed the plaintiff's confidences to the plaintiff's wife, allegedly causing the plaintiff's marriage to deteriorate, rather than when the plaintiff patient actually learned of the wrongful disclosures. *Bullion*, 872 F Supp at 306.

Clearly then, under Michigan law, the plain language of MCL 15.363(1), which contains no notice requirement or any type of discovery rule, controls the outcome here. Millar's claim accrued when Imlay City committed the alleged violation of the Whistleblowers' Protection Act, i.e., when Imlay City committed the wrong, by informing the Construction Code Authority, via letter dated March 20, 2014, that it no longer wished for Millar to perform inspections in Imlay City. The harm to Millar thus occurred on the same date, even if he did not learn about it until March 31, 2014, as he alleges. Indeed, Millar, by his own admission, was aware at least by March 31, 2014 that Imlay City had requested on March 20, 2014 that the Construction Code Authority send a different employee other than Millar to conduct inspections within the City. Accordingly, he had plenty of time to file his Whistleblowers' Protection Act claim within 90 days of the City's alleged wrongful act; he simply failed to do so. His claim filed June 26, 2014 is thus untimely.

C. The case law on which Millar relies does not compel a different conclusion

In his application for leave to appeal, Millar cites decisions from this Court and the Court of Appeals addressing the Whistleblowers' Protection Act, but none of them involve claim accrual and thus they are irrelevant to the issue before this Court. For example, in *Wurtz v Beecher Metro Dist*, 495 Mich 242, 249-50; 848 NW2d 121 (2014), this Court held that a contract employee whose term of employment had expired without being subject to a specific adverse employment action under the Whistleblowers Protection Act and whose contract was not renewed, had no remedy under the Act because, by its express language, the Act applies only to current employees. It is likewise entirely unclear why Millar cites *Smith v City of Flint*, 313 Mich App 141, 150-51; 883 NW2d 543 (2015), wherein the Court

of Appeals held that a police officer's assignment to patrol an allegedly dangerous part of the city did not constitute an adverse employment action under the Whistleblowers' Protection Act. *Smith* otherwise supports Imlay City's position since the Court determined that the plaintiff's complaint was also untimely because the order relieving him of his duties as union president and returning him to the position of road patrol was issued in April 2012, but he did not file his complaint until May 31, 2013, well past the 90-day limitations period. *Id*. at 150. Likewise here, where the City's alleged wrongful act occurred on March 20, 2014, Millar's claim filed June 26, 2014 is beyond the 90-day limitation period set forth in MCL 15.363(1) and is therefore untimely.

RELIEF

WHEREFORE, Defendant City of Imlay City requests this Court deny leave to appeal, issue any other relief this Court deems appropriate, and award costs and attorney fees so wrongfully sustained in defending this appeal.

Respectfully submitted,

PLUNKETT COONEY

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EXHIBIT 1

2016 WL 156185
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Nichole Lanette BRADFORD, Plaintiff–Appellant,
v.
MGH FAMILY HEALTH CENTER, d/b/a Muskegon Family Care, d/b/a Bridges to Wellness, Sheila Bridges, Emmitt A. Davis, Linda Malone, Jeffrey Melton, Lum Mandy, Sue McCarthy, and Barbara Herd, Defendants–Appellees.

Docket No. 325312.
|
Jan. 12, 2016.

Muskegon Circuit Court; LC No. 14–049383–CZ.

Before: BOONSTRA, P.J., and SAWYER and MARKEY, JJ.

Opinion

PER CURIAM.

***1** Plaintiff appeals by right the trial court's December 15, 2014 opinion and order granting defendants summary disposition pursuant to MCR 2.116(C)(7) and (C)(10) regarding plaintiff's action under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.* The trial court ruled that the undisputed facts showed that plaintiff had not filed her action within "90 days after the occurrence of the alleged violation of" the WPA. MCL 15.361(1). Specifically, the trial court ruled that defendants' failure to renew plaintiff's fixed-term contract was not actionable under MCL 15.362. *Wurtz v. Beecher Metro Dist,* 495 Mich. 242, 244; 848 NW2d 121 (2014). Any other possible accrual dates for plaintiff's WPA action occurred more than 90 days before plaintiff filed her complaint on February 19, 2014. We affirm.

I. STANDARDS OF REVIEW

Defendants brought their motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact), and MCR 2.116(C)(7) (immunity granted by law). This Court reviews de novo the trial court's grant or denial of summary disposition. *Dextrom v. Wexford Co,* 287 Mich.App 406, 416; 789 NW2d 211 (2010). When considering a motion under MCR 2.116(C)(10), the court must view the proffered evidence in the light most favorable to the party opposing the motion. *Maiden v. Rozwood,* 461 Mich. 109, 120; 597 NW2d 817 (1999). A trial court properly grants the motion when the proffered evidence fails to establish any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *West v. Gen Motors Corp,* 469 Mich. 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id.*

A party may be granted summary disposition under MCR 2.116(C)(7) when the undisputed material facts establish that the plaintiff's claim is barred by the pertinent statute of limitations. *Kincaid v. Cardwell,* 300 Mich.App 513, 522; 834 NW2d 122 (2013). When addressing such a motion, the trial court must accept as true the allegations of the complaint unless contradicted by the parties' documentary submissions. *Patterson v. Kleiman,* 447 Mich. 429, 434 n6; 526 NW2d 879 (1994). Thus, although not required to do so, a party moving for summary disposition under MCR 2.116(C)(7) may support the motion with affidavits, depositions, admissions, or other admissible documentary evidence, which the reviewing court must consider. *Maiden,* 461 Mich. at 119; MCR 2.116(G)(5). If no material facts are disputed, whether a plaintiff's claim is barred by the pertinent statute of limitations is a question of law for the court to determine. *Kincaid,* 300 Mich.App at 523; *Dextrom,* 287 Mich.App at 429.

This Court also reviews de novo as a question of law whether evidence establishes a prima facie case under the WPA. *Roulston v. Tendercare (Mich), Inc,* 239 Mich.App 270, 278; 608 NW2d 525 (2000). Furthermore, the interpretation of clear contractual language is an issue of law reviewed de novo on appeal. *Klapp v. United Ins Group Agency, Inc,* 468 Mich. 459, 463; 663 NW2d 447 (2003).

II. DISCUSSION

*2 The trial court correctly ruled that the undisputed facts showed plaintiff did not file her action within "90 days after the occurrence of the alleged violation of" the WPA. MCL 15.361(1). Plaintiff's effort to distinguish *Wurtz,* 495 Mich. 242 is unavailing; therefore, the trial court correctly ruled that defendants' failure to renew plaintiff's fixed-term contract was not a "discharge" actionable under MCL 15.362. The only other timeframe during which defendants could have committed prohibited acts of discharge, threats, or discrimination against plaintiff because of her protected activity occurred on or before October 14, 2014, when defendants notified plaintiff that she should no longer report to work and that her contract would not be renewed. Because these acts occurred more than 90 days before plaintiff filed her complaint on February 19, 2014, the trial court properly granted defendants summary disposition.

"The WPA provides a remedy for an employee who suffers retaliation for reporting or planning to report a suspected violation of a law, regulation, or rule to a public body." *Anzaldua v. Neogen Corp,* 292 Mich.App 626, 630; 808 NW2d 804 (2011). Specifically, the WPA provides:

> An employer shall not *discharge, threaten,* or otherwise *discriminate* against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action. [MCL 15.362 (emphasis added).]

This statutory language sets forth three elements that a plaintiff must establish to create a prima facie case for relief under the WPA:

> (1) The employee was engaged in one of the protected activities listed in [MCL 15.362].
>
> (2) [T]he employee was discharged, threatened, or otherwise discriminated against regarding his or her compensation, terms, conditions, location, or privileges of employment.
>
> (3) A causal connection exists between the employee's protected activity and the employer's act of discharging, threatening, or otherwise discriminating against the employee. [*Wurtz,* 495 Mich. at 251–252 (citations and footnotes omitted); see also *Anzaldua,* 292 Mich.App at 630–631.]

An action for relief under the WPA must be promptly filed "within 90 days after the occurrence of the alleged violation of this act." MCL 15.361(1). Under the plain language of the statute, an action under for violation of the WPA accrues when the retaliatory or discriminatory acts occur. *Joliet v. Pitoniak,* 475 Mich. 30, 32, 40–41; 715 NW2d 60 (2006). This is consistent with the general rule regarding statutes of limitations that a "claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827; see *Joliet,* 475 Mich. at 36, 41. When an employee alleges in an action that because of engaging in protected activity an employer discharged, threatened, or otherwise discriminated against the employee, but the alleged acts of discrimination occurred outside 90 days preceding the filing of the complaint, the trial court properly dismisses the complaint on a motion for summary disposition under MCR 2.116(C)(7). *Anzaldua,* 292 Mich.App at 636.

*3 In this case, it is undisputed that plaintiff engaged in protected activity and that her employer suspended her from employment with full pay and benefits on October 10, 2013. It is also undisputed that plaintiff's employer notified plaintiff on October 14, 2013 that her contract, expiring on December 1, 2013, would not be renewed. Plaintiff argues that not renewing her contract was a "discharge" that the WPA prohibits so that she timely filed her complaint on February 19, 2014. Plaintiff's argument fails because there is also no

dispute that plaintiff was employed under a written, fixed-term contract of employment that expired on December 1, 2013. While the employment contract contained a clause that permitted it to "be renewed for additional periods by written agreement of the parties," it was not. Our Supreme Court in *Wurtz* held "that the WPA, by its express language, has no application in the hiring context. Thus, the WPA does not apply when an employer declines to renew a contract employee's contract." *Wurtz,* 495 Mich. at 249. The failure to renew a fixed-term employment contract is simply not among the specific acts the WPA prohibits. *Id.* at 251 n14. While the WPA does protect an employee *while* working under a fixed-term contract from employer retaliation because of engaging in protected activity, "the WPA does not apply to decisions regarding contract renewal." *Id.* at 256. Plaintiff's efforts to distinguish *Wurtz* fail.

First, plaintiff argues that she was discharged on December 1, 2013 because that was the date her salary and benefits ended and, under her theory of the case, her economic damages began. But this fact does not distinguish her case from that of *Wurtz* or any other case where a fixed-term employment contract is not renewed. Moreover, her cause of action accrues when the alleged acts of discrimination occur, not when damages may result. *Joliet,* 475 Mich. at 36, 41; MCL 15.361(1). In this case, plaintiff was suspended on October 10, 2013, and defendants decided and notified plaintiff her contract would not be renewed on October 14, 2013. These acts occurred more than 90 days before plaintiff filed her complaint.

Next, plaintiff argues that this case is distinguished from *Wurtz* because in *Wurtz* the fixed-term contract did not contain a provision regarding its renewal, but in this case, plaintiff's contract contained a provision providing that the agreement "*may be renewed* for additional periods by written agreement of the parties." (Emphasis added). The *Wurtz* Court made the following observation in a footnote: "Wurtz's contract did not contain any renewal clause imposing some obligation or duty on the employer to act. Thus, we need not address the effect that such a clause would have on our analysis." *Wurtz,* 495 Mich. at 258 n32. Nothing in the plain language of the renewal clause in plaintiff's contract imposes an "obligation or duty on [defendants] to act." *Id.; Burkhardt v. Bailey,* 260 Mich.App 636, 656–657; 680 NW2d 453 (2004) (an unambiguous contract must be enforced according to its plain terms, not on the basis of a party's perceived reasonable expectations). That the parties for numerous years had annually mutually agreed to renew plaintiff's contract for an additional fixed one-year term does not alter the terms of the contract itself. *Id.* This is particularly true in this case because the contract contained an integration clause that renders irrelevant the parties' past decisions to renew prior contracts. [1] *Northern Warehousing, Inc v. Dept of Ed,* 475 Mich. 859; 714 NW2d 287 (2006); *Ditzik v. Schaffer Lumber Co,* 139 Mich.App 81, 88–89; 360 NW2d 81 (1984) (A binding agreement with an integration clause supersedes inconsistent terms of prior agreements and previous negotiations; the parties "prior course of performance cannot alter the clear and unambiguous language of [a] contract").

***4** Third, plaintiff argues that the holding of *Wurtz* does not apply to her case because she was an at-will employee. Plaintiff's effort to distinguish *Wurtz* on this basis also fails. The *Wurtz* Court noted that its "holding also has no bearing on at-will employees." *Wurtz,* 495 Mich. at 256. The Court explained that although "an at-will employee cannot maintain any expectation of future employment, the employment continues indefinitely absent any action from the employer." *Id.,* citing *McNeil v. Charlevoix Co,* 484 Mich. 69, 86; 772 NW2d 18 (2009). Thus, in contrast to a fixed-term contract employee, "an at-will employee does not need to reapply for the job for the employment to continue beyond a certain date. Once hired, an at-will employee will not later find himself or herself in the same position as a new applicant." *Wurtz,* 495 Mich. at 256. The Court concluded that "[a] current at-will employee therefore stands squarely within the WPA's protections." *Id.* at 256–257.

In citing *McNeil,* it is apparent that the *Wurtz* Court was referring to common-law, at-will employment. In *McNeil,* the Court stated in the absence of a contract to the contrary or a specific statutory right or protection, employment for an indefinite term may generally be terminated by the employer or the employee "at any time, for any or no reason whatsoever." *McNeil,* 484 Mich. at 79, 86; see also *Suchodolski v. Michigan Consol Gas Co,* 412 Mich. 692, 695–696; 316 NW2d 710 (1982) ("In general, in the absence of a contractual basis for holding otherwise, either party to an employment contract for an indefinite term may terminate it at any time for any, or no, reason."). In the absence of anything to the contrary, employment is presumed to be at-will, meaning

that employment is subject to termination "at any time and for any—or no—reason, unless that termination was contrary to public policy." *Kimmelman v. Heather Downs Mgt Ltd,* 278 Mich.App 569, 572–573; 753 NW2d 265 (2008).

Plaintiff's contract did possess one aspect of at-will employment-it was subject to termination by either party without cause, but only on 60–days' written notice. But contrary to the at-will employment the *Wurtz* Court discussed which would continue "indefinitely absent any action from the employer," *Wurtz,* 495 Mich. at 256, plaintiff's contract was for a fixed period of time, one year, and had a fixed expiration date, December 1, 2013. So, while plaintiff's contract possessed one aspect of at-will employment, this aspect applied only while plaintiff remained employed during the term of the contract. This conclusion, however, does not exempt plaintiff from the *Wurtz* holding regarding fixed-term employment contracts. It only means, as the *Wurtz* Court held, that during plaintiff's service under the terms of her employment contract, the WPA applies. "[T]he WPA does protect employees working under fixed-term contracts from prohibited employer actions taken with respect to an employee's service under such a contract." *Id.*

***5** Finally, plaintiff argues that defendants' "threats" against plaintiff and her suspension are also actionable under the WPA. While this may be true, as the trial court recognized, these actions occurred well outside the 90–day period of time preceding the filing of plaintiff's complaint. Consequently, the trial court properly granted defendants' motion for summary disposition under MCR 2.116(C)(7) and MCR 2.116(C)(10). *Wurtz,* 495 Mich. at 249, 259; *Anzaldua,* 292 Mich.App at 636.

We affirm. Defendants as prevailing parties may tax costs pursuant to MCR 7.219.

All Citations

Not Reported in N.W.2d, 2016 WL 156185

Footnotes

1 Paragraph 12 of the contract provides: "This Agreement contains the complete and exclusive understanding of the parties with respect to PA's employment with MFC. This Agreement supersedes all other agreements between the parties with respect to the subject matter. Furthermore, all policy statement[s], manuals or documents issued by MFC shall be interpreted in a manner consistent with this Agreement."

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